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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 639

EMMETT GRAHAM HAGY
Petitioner

v.

NORFOLK AND WESTERN RAILWAY COMPANY
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	2
Statement	2
Argument	4
I. No Federal Question is Involved	4
II. The Alleged Federal Question Was Not Raised in a Timely Manner	4
III. The Decision by the Virginia Supreme Court of Appeals is Clearly Correct and in Accord with Well-established Legal Principles	6
Conclusion	9

CITATIONS

Cases:

	Page
Forbes v. *State Council of Virginia*, 216 U. S. 396, 30 S. Ct. 295, 54 L. Ed. 534 (1910)	5
Herndon v. *Georgia*, 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935)	5
Norfolk & W. R. Co. v. *Benton*, 160 Va. 633, 169 S. E. 560 (1933)	5, 8
Radio Station WOW, Inc. v. *Johnson*, 326 U. S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092 (1945)	5
Ross v. *Oregon*, 227 U. S. 150, 33 S. Ct. 220, 57 L. Ed. 458 (1913)	4
Southern Railway Co. v. *Thompson*, 186 Va. 106, 41 S. E. 2d 456 (1947)	8

Miscellaneous:

Rule 19 (1) (a) of the Rules of the Supreme Court of the United States	4

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Opinions Below

The first opinion of the Virginia Supreme Court of Appeals (printed as an Appendix to the Petition for Certiorari) is reported at 201 Va. 183, 110 S. E. 2d 177. The opinion denying Petitioner's request for a rehearing is unreported but is included in Petitioner's Appendix.

Jurisdiction

Petitioner relies upon 28 U. S. C. §1257 (3) to confer jurisdiction on this Court.

Questions Presented

(1) Whether, in a negligence action for personal injuries, it is violative of the Fourteenth Amendment for the highest court of a state to hold the plaintiff guilty of contributory negligence as a matter of local law and reverse a jury verdict in his behalf.

(2) Whether an alleged federal question, raised for the first time in a petition for rehearing to the highest court of a state, which question is not ruled upon by the state court in denying a rehearing, has been timely presented so as to be considered by this Court on a Petition for Certiorari.

Constitutional Provision Involved

Petitioner states that the Fourteenth Amendment of the United States Constitution is involved. No Federal statute or regulation is alleged to be involved.

STATEMENT

This was a simple personal injury action, brought by the Petitioner against the Respondent, resulting from a railroad crossing accident between Petitioner's truck and Respondent's locomotive. At the trial of this case, and later before the Virginia Supreme Court of Appeals, the Respondent contended that Petitioner was — on the basis of his own testimony — guilty of contributory negligence as a matter of law and that there was no proper jury question presented by the evidence.

The trial court rejected Respondent's contention and submitted to the jury the questions of contributory negligence and last clear chance. A jury verdict for $70,000 resulted.

On appeal, the principal trial court error relied upon by Respondent was the failure of the court to hold the Petitioner guilty of contributory negligence as a matter of law. In its opinion, the Virginia Supreme Court of Appeals recited the pertinent portions of the Petitioner's testimony (201 Va. 183 at 185-186, 110 S. E. 2d 177 at 179-180) and concluded, on the basis of similar cases decided by that tribunal, that the Petitioner was guilty of contributory negligence as a matter of law and that, for that reason, the trial court erred in submitting the case to the jury. The trial court decision for Petitioner was, therefore, reversed, and final judgment was entered for Respondent.

In the above factual context—patently involving only a question of local tort law—the Petitioner applied to the Virginia Supreme Court of Appeals for a rehearing. Then, for the first time, Petitioner attempted to keep his faltering cause alive by alleging, among other things, that he had been deprived of a property right without due process of law and that he had been denied equal protection of the laws.

The Petition for rehearing was denied by the Virginia Supreme Court of Appeals with the following opinion on October 12, 1959:

> "On mature consideration of the petition of Emmett Graham Hagy, defendant in error, to set aside the judgment rendered herein, on the 3rd day of September, 1959, and grant a rehearing thereof, the prayer of the said petition is denied." (Petitioner's Appendix, p. l.)

No portion of the original opinion by the state court, nor any statement in the opinion denying a rehearing, considered or related to a federal question.

ARGUMENT

POINT I

No Federal Question is Involved

It is manifest from the Record and the Petition for Certiorari that this case involves only local law and that no federal question is in issue. The opinions by the Virginia Supreme Court of Appeals in this matter are absolutely devoid of any reference to a Federal question. Furthermore, the considerations mentioned in Rule 19 (1) (a) of this Court as governing review by certiorari to state courts are simply non-existent in the present situation.

The only question here involved, therefore, is one of state law; and this Court has repeatedly held that it will not review such a case (e. g. Ross v. Oregon, 227 U. S. 150, 33 S. Ct. 220, 57 L. ed. 458 [1913]).

It is most significant, Respondent submits, that nowhere in his Petition for Certiorari (or in his brief supporting the Petition) does Petitioner cite any case in which a similar situation has been reviewed by this Court on certiorari.

POINT II

The Alleged Federal Question Was Not Raised in a Timely Manner

The first time Petitioner alleged that a Federal question was present in this case was in his petition for rehearing after final judgment was entered by the state court.

But this constitutional question which Petitioner belatedly tried to raise was not ruled upon by the Virginia Supreme Court of Appeals. The court simply stated that "on mature consideration" the petition for rehearing was denied.

Respondent believes it well established that it is not sufficient to raise the federal question for the first time in a petition for rehearing after judgment has been rendered by the state court, unless the court entertains the motion and decides the question, or unless the state court decision is a deviation from past precedents and hence an unexpected result. *Herndon* v. *Georgia*, 295 U. S. 441, 55 S. Ct. 794, 79 L. ed. 1530 (1935) and *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 65 S. Ct. 1475, 89 L. ed. 2092 (1945).

It has also been held by this Court that an order of the highest court of a state, made in passing upon a petition for rehearing, which recites that "on mature consideration" the prayer of said petition is denied, does not show that the court passed upon the federal question first presented by such petition so as to sustain a petition for certiorari. *Forbes* v. *State Council of Virginia*, 216 U. S. 396, 30 S. Ct. 295, 54 L. ed. 534 (1910).

Therefore, since the Virginia Supreme Court of Appeals did not pass upon the alleged Federal question, Petitioner can only argue that he did not have an opportunity to raise the question until his petition for rehearing.

But the state court decision did not come as a surprise to Petitioner. In fact, Petitioner realized that prior Virginia law opposed his position, and he argued below that the case of *Norfolk & W. R. Co.* v. *Benton*, 160 Va. 633, 169 S. E. 560 (1933) should be overruled. The Virginia court reacted to this argument by stating:

"In his brief counsel for Hagy admits that the *Benton* case stands in his way and asserts that it is 'contrary to the great weight of authority' and should be 'disavowed' by us. We decline that invitation for the reason that that decision is based on sound reasoning and the application of elementary principles." 201 Va. 183 at 190, 110 S. E. 2d 177 at 182.

Had Petitioner felt that the established law of Virginia violated his rights under the Fourteenth Amendment of the United States Constitution, he could easily have raised that question prior to his petition to the state court for rehearing.

POINT III

The Decision by the Virginia Supreme Court of Appeals Is Clearly Correct and in Accord with Well-Established Legal Principles.

After a searching examination of the Record and a careful analysis of applicable law, the Virginia Supreme Court of Appeals reversed Petitioner's jury verdict. The basis of Petitioner's request for certiorari is the distinction existing in Virginia law between the scope of appellate review on an appeal and on a writ of error. As Petitioner states, the present case was an action at law reviewed by writ of error.

Respondent will not quarrel with the distinction drawn by Petitioner between a writ of error and an appeal under Virginia law. It is sufficient to state that such distinction is here totally inapplicable and can have no bearing upon the result in this case.

Petitioner concedes (Petition for Certiorari, p. 10) that review by writ of error embraces the right to correct errors of law. That is precisely what the Virginia Supreme

Court of Appeals did in the instant case. The trial court concluded that the question of defendant's contributory negligence was for the jury to determine. Whether the trial court was correct in that regard was patently a pure question of local law on which the appellate court disagreed with the trial court.

Petitioner repeatedly alleges but nowhere demonstrates that the Supreme Court of Appeals of Virginia accepted Respondent's version of the trial court evidence. Even a casual reading of the opinion by that court makes clear, however, that it is the Petitioner's own evidence that is primarily referred to as providing the basis for the court's conclusion that Petitioner was contributorily negligent as a matter of law.

The surprising allegation of Petitioner is that: "The facts urged by the plaintiff-in-error [Norfolk and Western Railway Company] below . . . were adopted against the jury verdict." (Petition for Certiorari, p. 10.) Petitioner's own version of the facts shows that such was not true. The Petition for Certiorari states: "Petitioner saw the back of the engine when he approached within 12 or 15 feet of the crossing. His speed was such that he could have stopped within a foot or two at any time had he been given a signal. He thought the engine was standing still." (Petition for Certiorari, p. 6.)

The Virginia Supreme Court of Appeals simply concluded, on the basis of the above-quoted testimony, that the Petitioner did not look with sufficient care to satisfy his legal duty in that regard. As stated in the opinion below:

> "It is undisputed that as Hagy approached the crossing the engine and tender were not standing, as he thought, and were not 'going up,' as the little girl had said, but were backing toward the crossing at a

speed variously estimated from 25 to 35 miles per hour . . . .

"While some of the circumstances of the present case are unusual, the determination of whether the plaintiff was guilty of contributory negligence turns upon the application of simple and well-settled principles. It is elementary that a traveler on a highway before crossing a railroad track must exercise ordinary care and look effectively for approaching trains. . . .

"The principal and basic fact is that the plaintiff, an experienced driver, familiar with this crossing and familiar with the vehicle which he was then operating, drove slowly from a place of safety onto the crossing in front of the engine and tender which, if he ever saw, he did not look at with sufficient care to determine whether they were standing still, coming toward the crossing, or going in the opposite direction . . . .

"Surely, such casual and perfunctory looking was not looking effectively or with reasonable care. It was tantamount to not looking at all and likely to produce the same result." (201 Va. 183 at 186, 187, 188, and 190; 110 S. E. 2d 177 at 179, 180, 181, and 182.)

The result reached in this case by the state court is obviously in accord with well-established negligence principles. It is also in accord with Virginia law as stated in and exemplified by *Southern Railway Co. v. Thompson*, 186 Va. 106, 41 S. E. 2d 456 (1947) and *Norfolk & Western Ry. Co. v. Benton*, 160 Va. 633, 169 S. E. 560 (1933). These decisions are cited and relied on by the Virginia Supreme Court of Appeals (see 201 Va. 183 at 189-190, 110 S. E. 2d 177 at 182).

The property rights which Petitioner had in the jury verdict in this case certainly did not become final or inviolate until the completion of the appellate process. In strict accordance with state law, the jury verdict was appealed, considered by the appellate court, and reversed. To hold such procedure contrary to due process of law would be a most revolutionary innovation in American jurisprudence.

Viewed realistically and in perspective, this is but one of thousands of instances each year in which state courts find it necessary, on questions of law, to reverse jury verdicts in personal injury actions. This case, therefore, presents no novel or unusual circumstances which would be of such wide public or governmental interest as to merit the attention of this Court.

The judicial procedure in the present case was neither unusual nor unfair; and since the state court here reached a logical and just result by lawful and constitutional proceedings, its determination should not be reviewed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,
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